Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	
	)	

REPLY COMMENTS OF THE CITY OF PHILADELPHIA IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

The City of Philadelphia (the "City") submits these Reply Comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") set forth in the Commission's Order and FNPRM released March 5, 2007 in the above-captioned proceeding, and the Comments filed in response to the FNPRM.

In these Reply Comments, the City will focus on the untenable position of the National Cable & Telecommunications Association ("NCTA"), presumably speaking for the incumbent cable operators who are its members, that the Order's conclusions, relating to franchise fees, PEG and institutional networks requirements, and mixed use networks, should be applied immediately to existing franchisees as well as to new telephone company entrants. NCTA, like many commenters, states that the Commission did not have the authority under Section

621 of the Communications Act to adopt the Order. NCTA states that in addition to lacking authority, the Commission did not have a factual basis sufficient to reach the conclusion that telephone companies need relief from the local franchising process. Nevertheless, NCTA seeks to have the Commission apply its findings immediately to incumbent franchisees. NCTA's position makes no sense. This entire proceeding is founded on Section 621(a)(1) of the Communications Act, and its prohibition on unreasonable refusal to grant a franchise to a competitor. If the Commission does not have authority to grant relief to new entrants under Section 621 – and the City certainly agrees with NCTA that the Commission does not – then certainly the Commission does not have authority to grant the same relief to incumbent franchisees, for the obvious reason that Section 621 deals expressly and solely with applicants for new competitive franchises. In the Commission's words, its conclusions in the Order are specifically, and entirely, directed at "facilitat[ing] and expedit[ing] entry of new cable competitors into the market for the delivery of video programming, and accelerat[ing] broadband deployment" by those same new entrants. (Order at ¶ 1). Similarly, if the Commission did not establish a factual record sufficient to warrant the relief it granted to new entrants – and again the City certainly agrees with NCTA that the Commission did not – then clearly that thin factual record cannot justify extending the same relief to incumbent franchisees.

The effect of extending the Order's findings to incumbents is to have the Commission unilaterally rewrite essential terms in every existing franchise agreement, in complete disregard of the contractual rights of the local franchising authorities ("LFAs") who negotiated them, as well as the community needs reflected in those negotiations. Congress adopted specific provisions to govern the modification of franchise terms. The most important are the Section 626 procedures for renewing existing franchises (47 U.S.C. § 546) and the orderly review and renegotiation of terms there contemplated. That process provides for an application procedure and clear time frames that are flatly inconsistent with the application procedure and "shot clock" provided in the rule adopted by the Order.[1] So is the express accommodation of community needs and interests incorporated in the renewal process; and more generally, the orderly review and renegotiation of terms, with protection for the rights of both parties, that Congress clearly contemplated in adopting Section 626. In Section 625 (47 U.S.C. § 545), Congress again set forth a specific procedure of appeal to the local franchise authority, paired with a judicial remedy, whereby an existing franchisee can obtain modification of franchise terms. Congress there adopted "commercial impracticability" as the standard for granting

[1] The time frame established by Congress for the renewal process is in sharp contrast to the periods set by the Commission in the Order for LFAs to conclude negotiations with to new franchise applicants. Congress at Section 626(a) determined that as early as 36 to 30 months before franchise expiration date, the LFA, either on its own initiative or at the request of the incumbent cable provider, would commence the renewal process with a public needs assessment proceeding to identify future cable-related community needs and interests. Congress clearly anticipated a franchise renewal process that could take up to three years. This is in sharp contrast to the 180 day shot clock which the Commission has set for completion of negotiations with franchise applicants not yet maintaining local facilities in the local rights-of-way, or the even shorter 90 day shot clock set for completion of franchise negotiations with franchise applicants with facilities already occupying the local public rights-of-way.

franchise modifications outside the renewal process. The Commission does not have the authority to compel a wholesale rewrite of existing franchise terms in complete disregard of the Act's very explicit renewal and franchise modification procedures in Sections 626 and 625. Nor does it have the authority, in contravention of those express procedures, to predetermine outcomes by extending its special relief for new entrants to incumbent franchisees at renewal.

NCTA ignores and would have the Commission ignore these provisions of the Communications Act because they undercut its effort to secure relief for incumbents by means of a Commission fiat that would ignore both LFA rights and the plain language of the Act. The City urges the Commission to respect the letter and intent of Sections 621, 625 and 626 of the Act, and to reject the NCTA's attempt to override the rights and legitimate interests of the LFAs they are intended to protect.

NCTA's opening Comments go on to claim that the Commission has made rulings that were never made, pursuant to provisions of the Communications Act which the Commission never cited. NCTA states that the Commission has adopted a new definition or clarification of "franchise fee" and claims that such definition has immediate application to its members. Congress set forth a specific definition of "franchise fee," with a list of legitimate exclusions in calculating the fee, in Section 622 of the Act. The Commission has not redefined the term "franchise fee," nor does it have the authority to rewrite a definition established by Congress. In this proceeding, the Commission purports only to promulgate rules governing the treatment of applicants for new franchises. To the extent the Commission has considered application of such rules to existing franchisees, it is limited by the procedures that Congress has included in the Communications Act with respect to renewals of existing franchises, or modifications during the franchise term due to changed circumstances.

This point applies equally to NCTA's contention that the Commission's remarks with respect to PEG channels and institutional networks should have immediate application to incumbent franchisees. NCTA's claim that the Commission somehow issued a "clarification" of Section 611(a) PEG and I-Net obligations again ignores the fact that the Order is pursuant to Section 621(a)(1). The City and most LFAs bargained for provisions in our incumbent franchises to ensure PEG support and institutional networks, and we have the right to expect that the benefits and obligations of these contracts will be in force throughout the full term of existing franchises. To the extent that these contracts are modified outside the renewal process or the mechanism provided in Section 625, it should be through negotiation of the parties, which would allow for consideration of local needs and circumstances, and not by the Commission fiat the NCTA seeks.

Finally, NCTA's argument that the Commission's Order with respect to "mixed networks" (¶¶ 121-124 of the Order) somehow applies immediately to incumbent cable providers is particularly disingenuous. The Commission at ¶121 rules that it is unreasonable for a local franchise authority to refuse to award a franchise based on issues related to non-cable services and/or operation of facilities that do not qualify as a cable system.   As pointed out in the Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy ("Local Government Group") , these paragraphs of the Order are premised on an assumption that a telephone provider currently maintaining facilities in the public rights-of-way may choose to upgrade its existing telephone network prior to providing cable and non-cable services. An incumbent cable operator is in a wholly different posture because it is already using its network to provide cable services. This is another case where the Commission's conclusions clearly apply only to new franchise applicants and not to incumbents. NCTA's attempt to rewrite the Commission's words to secure an advantage for its members should be rejected.

The City also believes that it would be a particular infringement of local government interests if the Commission were to impose restrictions at the time of franchise renewal on LFA discretion to determine build-out requirements appropriate to local conditions. LFAs must have the authority to review the appropriateness of build-out requirements periodically, at least at the time of franchise renewal. Local government is best able to assess local needs, and to make adjustments for population and social changes. It would not make sense for a franchise territory to be frozen in time, as housing and commercial development causes once sparsely populated areas to become bustling communities. Nor should local franchise authorities be required to wear blinders to social trends that may increase the reliance of citizens or of commerce upon the availability and ubiquity of the networks which may initially have served more limited entertainment purposes. Such community needs assessments conducted at the time of franchise renewal by the local franchising authorities were understood by Congress as an essential basis for determining what would be required of local cable providers. To accept the view that limited build-out requirements applied to a new entrant should automatically be applied to current cable providers suggests that build-out standards are ones which can only ratchet downwards with each new entrant or renewal; this is markedly inconsistent with the Congressional view that community needs should be periodically reevaluated, and should be the basis for requirements to be ascertained by local franchising authorities.

The City reiterates that we support and adopt the comments of the Local Government Group and oppose the tentative conclusion of the Order and FNPRM(at ¶ 140) that the findings made in this proceeding should apply to incumbent cable operators, whether at the time of renewal of those operators' current franchises, or thereafter.

For the foregoing reasons, the City urges the Commission to reject its tentative conclusion that its findings in the Order, and/or the rule adopted by the Order, should be extended to incumbent franchisees, either immediately or at the time of the renewal of their franchises. The City does, however, strongly endorse the FNPRM's tentative conclusion (at ¶ 142) that Section 632(d)(2) (47 U.S.C. § 552(d)(2)) bars the FCC from "preempt[ing] state or local customer service laws that exceed the Commission's standards," and from "preventing LFAs and cable operators from agreeing to more stringent [customer service] standards" than the FCC's.

Dated: May 7, 2007

Respectfully submitted,

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